
BETWEEN:

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada, ... PLAINTIFF,

AND

ACADIA SUGAR REFINING COMPANY LIMITED and THE EASTERN TRUST COMPANY, Trustee for certain Bondholders, ... DEFENDANTS.

1944
June 19-22
1947
Oct. 10

Expropriation—Expropriation Act, R.S.C. 1927, c. 64, ss. 2 (g), 9, 23, 26, 27, 31—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19 (a), 19 (b), 47—Annual value of leasehold interest—Onus of proof of value—Dangerous use of expropriated premises—Claim for damage to property injuriously affected by construction of any public work may include damage through use of expropriated property—Applicability of English decisions under Lands Clauses Consolidation Act, 1845—Measure of damages is depreciation in value of lands injuriously affected.

The plaintiff expropriated a two year leasehold interest in part of the defendant's sugar refining plant at Woodside on the eastern side of Halifax Harbour for defence purposes and stored explosives on the premises with the result that the defendant could not continue its ordinary insurance and took out a policy of War Risk Insurance. The action was taken to have the amount of the defendant's compensation determined by the Court.

1947

THE KING
v.
ACADIA SUGAR REFINING COMPANY LIMITED

Held: That the annual value of property expropriated for a term of years is the net value of the rent at which it might reasonably be let, having regard to the value of the property to the owner, or, in other words, the net value of the rent which a tenant, in a position similar to that of the landlord, "would have been willing to pay for the land sooner than fail to obtain it". Such a defence contemplates that all the factors of value that the owner of the premises and the "hypothetical" tenant would be likely to consider will be taken into account.

2. That the onus of proof of value in expropriation cases is on the former owner of the property whose value it is sought to establish.
3. That where part of the owner's land has been expropriated his right to compensation for the injurious affecting of his remaining land is not limited to the loss or damage resulting from the construction of the public work on the land taken but extends to that resulting from the use of such land.
4. That if land is expropriated under the Expropriation Act and its actual or anticipated use is such that other lands held by the same owner are injuriously affected thereby so that they are depreciated in value the owner is entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of his remaining lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land.
5. That the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected.

INFORMATION by the Crown to have the amount of the defendant's compensation for the value of the expropriated leasehold interest and the amount of the damage to its remaining property injuriously affected by the storage of explosives determined by the Court.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Halifax.

F. D. Smith K.C. and *W. E. Mosley* for plaintiff.

Hon. S. A. Haydon K.C. and *G. S. Cowan* for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (Oct. 10, 1947) delivered the following judgment:

The information exhibited herein shows that a leasehold interest in the lands described in paragraph 2 was expropriated by His Majesty for defence purposes for the

defence of Canada under the Expropriation Act, R.S.C. 1927, chap. 64. There were two expropriations, each being effected by the deposit of a plan and description of the lands in the office of the registrar of deeds for the County of Halifax in Nova Scotia pursuant to section 9 of the Act. The first deposit was made on October 5, 1942, and the second on December 16, 1942. The second plan and description included lands which had been omitted from the first. The lands belong to the first named defendant, hereinafter called the defendant, subject to a mortgage in favour of the second named defendant, as set out in paragraph 3. The leasehold interest that was expropriated was for the term of two years commencing on October 1, 1942, and ending on September 30, 1944. The parties have not been able to agree as to the amount of compensation money to which the defendant is entitled and come to this Court for adjudication thereon. The mortgage is not in arrears so that the defendant, the mortgagor, is entitled to the full amount of any award made.

Prior to the commencement of the action, namely, by letter dated March 6, 1943, the plaintiff offered the defendant the sum of $20,000 per annum as compensation for the expropriated leasehold interest and repeated this tender in the Information.

The defendant's claim for compensation is twofold. For the expropriated leasehold interest it claims at least $60,000 per annum. And it also claims an additional sum of $19,326.25 as the amount of premiums paid for War Risk Insurance.

The first issue is whether the defendant is entitled to more than $20,000 per year for the expropriated leasehold interest.

The expropriated leasehold interest was in respect of only a part of the defendant's large sugar refining plant located at Woodside on the eastern side of Halifax Harbour to the south of Dartmouth and between it and the Eastern Passage. The part that was affected included the raw sugar shed, the wharf in front of it, a number of smaller buildings, such as a bag plant, an oil storage shed, a fire pump house, a tool shed, a stevedores' rest room, a vacant lot and a roadway to the Eastern Passage Road.

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

The standard by which the amount of compensation money to which the former owner of expropriated property is entitled is to be measured is fixed by section 47 of the Exchequer Court Act, R.S.C. 1927, chap. 34, which reads:

47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.

The general principles applicable to the determination of the value of expropriated property were discussed by this Court in *The King* v. *W. D. Morris Realty Limited* (1), in which some of the leading authorities were reviewed. In *In re Lucas and Chesterfield Gas and Water Board* (2) Fletcher Moulton L.J. said:

The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

This case was approved by the Judicial Committee of the Privy Council in *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (3), where Lord Dunedin, at page 576, laid down two propositions relating to the value of the expropriated land:

(1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

The principle that the owner of expropriated property is entitled to have its fair market value based upon the most advantageous use to which the property is adapted or could reasonably be applied is, in my view, correctly stated in Nichols on Eminent Domain, 2nd Edition, para. 219, page 665, as follows:

In determining the market value of a piece of real estate for the purposes of a taking by eminent domain, it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value

(1) (1943) Ex. C.R. 140.
(2) (1909) 1 K.B. 16 at 30.
(3) (1914) A.C. 569.

for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test.

This is, of course, subject to the rule that it is only the present value as at the date of the expropriation of the future advantages of the property that is to be considered: *The King* v. *Elgin Realty Company Limited* (1).

Ordinarily, of course, the most advantageous use to which the property in question could be put would be as part of the defendant's sugar refining plant, but we are concerned with the situation as it existed at the date of the expropriation. The fact is that the defendant, under the force of war circumstances, decided to cease its sugar refining operations at Woodside. On June 5, 1942, the last sugar was taken out of the raw sugar shed and when the last refined product was disposed of the plant was shut down except for certain machine shop work which the defendant continued to do, employing only a small number of its former workmen. The likelihood of resumed sugar refining operations, for an indefinite period of time at any rate, was very slight. Apart from the machine shop operations, the defendant's plant lay idle.

The defendant then sought out storage business. Indeed this was regarded by it as the best use to which the raw sugar shed could be put, having regard to the wharf and railway facilities that were available. The likelihood that better use could be made of the plant at Woodside for storage purposes than could be made of that of the defendant's subsidiary at Saint John was one of the reasons for closing the former rather than the latter. A certain amount of distressed cargo storage was available. The evidence shows that one cargo was taken from the vessel *S.S. Hoyanger* and stored from June 24, 1942, to August 2, 1942, a total of 44 days, and then taken away by another vessel *S.S. Port of Halifax* which loaded from August 2, 1942, to August 7, 1942. It was also shown that a number of enquiries were made of the defendant as to whether it could take cargoes into storage. It is clear that a considerable amount of such storage business would have been available to the defendant if there had been no expropriation. There was a good deal of congestion in

(1) (1943) S.C.R. 49.

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

the harbour at Halifax during the year 1943, although at the end of the year it had eased off considerably. The defendant sought to make much out of the net revenues it might have received from distressed cargo and storage business. But, in my opinion, its estimate of such revenues, in addition to being speculative, was not supported by the evidence as a whole and was greatly exaggerated. Moreover, some of it would have been attributable to the use of equipment, such as tractors, which was not expropriated. Furthermore, it is always well to keep in mind that a distinction must be drawn between income from expropriated property and income from the business conducted upon it. Nichols on Eminent Domain, 2nd Edition, page 1173, puts the rule as follows:

> If the owner of property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill, and good management with which the business is conducted, that it furnishes no test of the value of the property. It is accordingly well settled that the evidence of the profits of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive; but evidence of the character and amount of the business conducted upon the land may be admitted as tending to show one of the uses for which the land is available.

This rule has been uniformly adopted and applied in this Court. It would not be possible, in my opinion, to fix the amount of the possible returns from this source of business that would properly be attributable to the premises. In any event, the defendant's estimate cannot be accepted as an independent test of value. All that can be said is that the capacity of the premises for enabling the owner to earn income from this source of business is an important factor that must be taken into account in any estimate of the value of the expropriated leasehold, for this would certainly affect the amount of the rent which a prospective tenant would be willing to pay for it.

The defendant also sought to show the value of the property in respect of which the leasehold interest was taken by evidence of the replacement cost of the buildings thereon less an allowance for depreciation. While such evidence is not an independent test of value it does not follow that it should be disregarded. It is a factor to be taken into account. In the statement of defence the

defendant alleged that at the date of expropriation the lands in question had an appraised replacement value of approximately $350,000. The evidence given by witnesses for the defendant showed a replacement value, as at the date of the expropriation, for the wharf, the various buildings, and stone and common fill and cribwork, amounting to $320,864. This was reduced by admitted allowances for depreciation to a total of $297,153.38. But, there was added to this latter amount a further sum of $50,707, according to the written argument for the defendant, to cover the so-called value of the roadway, the vacant lot, the land on which the buildings were built, as to which I do not recall any evidence as to its value except an unsupported estimate in Exhibit R, and certain equipment in the nature of fixtures. This would make a total of $347,860.38. In my view this appraisal of value even on the basis of replacement cost less depreciation is very considerably too high. The figures for the reconstruction cost of the wharf given by Mr. Morgan for the defendant, namely, $97,598 are very much higher than those given by Mr. Walkey for the plaintiffs, namely, $36,000. It is true that Mr. Morgan reduced his figure by $10,504.70 covering part of the dock not included in the expropriation and that his figure included the cost of the crib under the raw sugar shed and the north crib, amounting to $19,694.91. The deduction of these two amounts left a total of $67,398.69 against which Mr. Walkey's figure is to be compared. Mr. Morgan expressed the opinion that the wharf at the date of expropriation was probably worth 65% of its original value. But Mr. Walkey who examined the wharf on July 25, 1942, in view of its condition, refused to place a value on it because it was unsafe for any type of traffic and from an engineer's point of view had no value. Mr. Bennett, who inspected the wharf on September 18, 1942, expressed the opinion that its usefulness was greatly reduced and that it might be considered a hazard, that there were sections that were liable to collapse, that it was not in a safe condition for the mooring of large vessels or for the handling of heavy freight, and that, although he would not say it had no value, the structure was in such a condition that a new structure was warranted rather

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

than repairs to the old. It would not be unreasonable, in my opinion, under the circumstances, to reduce the defendant's estimate of the value of the wharf by at least $25,000. Then I have come to the conclusion that the defendant's figures in respect of the raw sugar shed are very much too high. The building was 28 years old and far from being in good condition. In addition to the defects admitted by the defendant, there were several large cracks in the walls, through which the water leaked and by which the steel was exposed for corrosion. Moreover, the construction was not in accordance with modern methods. Mr. O'Leary allowed only a deduction of $17,300 to repair the defects mentioned by him and took the view that there should be no allowance for depreciation beyond this. On the other hand, Mr. Mackenzie, with whose evidence I was much impressed, thought that, having regard to the nature and condition of the building and its construction there should be a depreciation allowance of 1½% per annum. This would be a reduction of $84,000 from replacement cost rather than $17,300. I have no hesitation in accepting his opinion on this matter. Then it should be noted that a number of the buildings, such as the bag plant, the fire pump house, and the tool shed, although valuable in connection with the ordinary purpose of the sugar refining plant, had little, if any, value in connection with the use of the raw sugar shed for storage purposes. Also, some of the buildings continued to be used by the defendant for its own purposes. There are also some other items in respect of which a deduction from the figures given for the defendant ought to be made. For example, the defendant's estimate of the replacement cost of the cribwork includes an item of $5,207 already included in the replacement cost of the wharf. And the estimate of $74,650 for the replacement cost of the stone and common fill is based upon assumptions rather than known facts as to quantities and also upon a higher cost of material than that given by the plaintiff's witnesses. Then no real evidence was given as to the value of the land. On the whole of the evidence and without reviewing it in detail, I am of the view that if the value of the property in question on the basis used by the defendant

had to be estimated, it ought not to be placed higher than $250,000. This amount would, I think, be the highest estimate of value that could reasonably be made of the property in respect of which the leasehold interest was taken.

The number of Canadian cases dealing with the expropriation of leasehold interests and the principles applicable to the ascertainment of their annual value is very small. In *The King* v. *Brown et al* (1) the Crown expropriated a leasehold interest in certain lands in Regina for the purpose of temporary military barracks for a term of 18 months and offered to pay $1,200 per month, plus taxes, insurance, light and heat and then before the term had expired filed an abandonment under what was then section 23 (new section 24) of the Expropriation Act. The owners claimed $2,500 per month net to them. Apart from the question of damages in respect of the abandonment, with which we are not here concerned, the matter before the Court was the value of the leasehold interest. Audette J., on the basis of a valuation of the property at $240,000 held that the amount offered by the Crown of $1,200 net per month was most reasonable yielding to the owners a net income of 6%. The case does not lay down any principle of general application and is helpful only in that the Court, under the facts of the case, considered that a return of a net 6% on the value of the premises was a reasonable rental. In a previous case, *The King* v. *McCarthy* (2), the question was dealt with indirectly. There the Government for the purposes of its shipyard at Sorel had expropriated certain property but had abandoned part of it and the Court was required to pass on the compensation for the use and occupation of such part for the period of its expropriation. The situation was to such extent comparable to what it would have been if a leasehold interest for the term of the period of use and occupation had been expropriated and Audette J. dealt with it on such basis. At page 432, he said:

> In renting property the owner should get more than 5% upon the value of the land, since out of such revenue he has to find a fair revenue over and above taxes, etc., and other known incidentals. It is often contended that the landlord should at least receive from the tenant 10% on the value of the property leased to allow him a fair return free of

(1) (1920) 20 Ex. C.R. 30. (2) (1919) 18 Ex. C.R. 410.

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

taxes, etc. I am of the opinion that if 8% were allowed on $7,158.15 from the 18th December, 1915, to the 24th January, 1919, namely, three years and 38 days, making the sum of $1,777.57, that it would represent a fair and just compensation to the defendant for the loss of use and occupation of their premises during the period in question.

This is tantamount to a finding of the value of a leasehold interest in the property for the term of the period in question. Again, this case is helpful only by way of illustration.

In my view, valuable assistance is obtainable from a number of English decisions dealing with the annual value of land. For certain purposes such annual value has been defined by statute. For example, by section 1 of the Parochial Assessments Act, 1836, 6 & 7 Wm. IV, chap. 96, the net annual value of land was defined as "the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent". While this definition is contained in an Act for the establishment of a "uniform mode of rating for the relief of the poor in England and Wales", which had not previously existed, it can, I think, be accepted as a fair statement of how the annual value of premises ought, in the absence of a specific statutory provision otherwise, to be ascertained for other purposes. This view is expressed in Stroud's Judicial Dictionary, 2nd Edition, page 86, the author adding the opinion that to such definition it may now be added that "in estimating such lettable value regard is to be had to the worth of the premises as used for the purposes for which, or in the manner in which, they are, for the time being, occupied". The cases support the author's view as to the diversity of the uses of the definition and its general prima facie applicability; for example, *In re Elwes* (1); *Dobbs* v. *Grand Junction Waterworks Company* (2); *Walker* v. *Brisley* (3). I think it may properly be adopted in the present case.

The annual value of property expropriated for a term of years must, as in the case of other expropriated property,

(1) (1858) 28 L.J. Ex. 46.
(2) (1883) 53 L.J.Q.B. 50.
(3) (1900) 2 Q.B. 735.

be its value to the owner. In *Pastoral Finance Association, Limited* v. *The Minister* (1) Lord Moulton described value to the owner as the amount which a prudent man, in a position similar to that of the owner, "would have been willing to give for the land sooner than fail to obtain it." A similar statement is applicable to the annual value of a leasehold interest.

I think it may, therefore, be stated generally that the annual value of property expropriated for a term of years is the net value of the rent at which it might reasonably be let, having regard to the value of the property to the owner, or, in other words, the net value of the rent which a tenant, in a position similar to that of the landlord, "would have been willing to pay for the land sooner than fail to obtain it". Such a definition contemplates that all the factors of value that the owner of the premises and the "hypothetical" tennant would be likely to consider will be taken into account. It is obvious, of course, that the definition, although seemingly a simple one, is not easy of application in the case of premises that are not ordinarily the subject of letting but an effort must, nevertheless, be made to apply it.

Where there is a known and proved rate of interest return on the value of property as the measure of the net yearly rental that might reasonably be expected from it the annual value of such property can be ascertained as a matter of arithmetic calculation once the value of the property is determined. This was done by O'Connor J. in *The King* v. *City of Toronto* (2), but it is obvious that this method is not an exclusive test of the annual value of a specific property and cannot be used at all where there is no governing rate of interest return in the locality where the expropriated property is situate. On the evidence it is not applicable in the Halifax area. No evidence of any current rates of rental returns on any kind of property was given on behalf of the defendant. Mr. De Wolf, for the plaintiff, knew of no building in Halifax or Dartmouth of the type of the defendant's property. He did, however, refer to the Market Building, which was rented at 27 cents per square foot giving a gross return of 6% per annum. Mr. Clark, also for the plaintiff, stated that there

(1) (1914) A.C. 1083 at 1088. (2) (1946) Ex. C.R. 424.

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

were no comparable buildings in Halifax or Dartmouth outside those of the National Harbour Board and that there were no accepted rates of rentals in Halifax for buildings of this type. He mentioned that the prevailing rate relating to residences was a net rental return of 6%.

It is well established that the onus of proof of value in expropriation cases is on the former owner of the property whose value it is sought to establish: *The King* v. *Kendall* (1). In my opinion, the defendant has not discharged this onus in the present case. No evidence has been adduced that would warrant my holding that the annual value of the expropriated leasehold interest was in excess of $20,000 per year. That amount, on a valuation of the property at $250,000 would produce a gross return of 8%. The defendant is on a fixed assessment of a very low amount and the other costs to it are not large, so that the net return would, I think, substantially exceed 6%. Under all the circumstances, I have come to the conclusion that, in the absence of proof that a larger amount than $20,000 per year could reasonably have been expected by the defendant, such amount could fairly be regarded as an adequate gross amount from which a fair annual value of the expropriated leasehold interest could be obtained. I find, therefore, that the amount of compensation money to which the defendant was entitled for the expropriated leasehold interest was the sum of $20,000 per year as offered by the plaintiff. This amount has been paid in full to the defendant as follows, namely, $20,000 on January 7, 1944, and $20,000 on March 23, 1944, one payment some months after the expiry of the first year and the other several months before the expiry of the second one. Under the circumstances, I see no occasion for the payment of interest on these amounts.

The claim for the amount of premiums paid for War Risk Insurance may now be considered. The facts are not disputed. For a short period of time, commencing December 1, 1942, and ending January 21, 1943, certain explosives, consisting of depth charges, practice shells and star shells were stored in the raw sugar shed. The evidence shows that such storage was dangerous. Then an insurance inspector, after an inspection of the defendant's

(1) (1912) 14 Ex. C.R. 71.

premises on December 16, 1942, reported to his principals the change of occupancy and the storage of explosives, with the result that the companies which had carried the insurance on the defendant's buildings at Woodside refused to continue to do so except subject to an endorsement on the policies excluding liability for loss or damage by explosion or fire caused thereby. Rather than continue the insurance subject to such limitations of risk the defendant decided to take out a policy of War Risk Insurance. Under the scheme of war risk insurance in force under the War Risk Insurance Act, 1942, Statutes of Canada, 1942, chap. 35, and the regulations made thereunder it was not possible for any one to insure only one of his several properties. If he wished to insure under the scheme he had to take out a policy covering all his properties, and if the insurer was a company it had to bring in not only all its own properties but also those of its subsidiaries. The defendant, therefore, had to insure not only its plant at Woodside but also that of its subsidiary at Saint John. The insurance was for one year commencing December 24, 1942. The total premium for all the properties covered was $19,326.35, of which $8,477.06 was attributable to the defendant's property at Woodside. The defendant claims the whole premium alleging that its payment was the result of the extra hazard created through the storage of the explosives.

The claim is not specifically pleaded as a claim for damage to the defendant's unexpropriated property on the ground that it has been injuriously affected by the use made of the property in respect of which the leasehold interest was taken, but that is what it must be if there is any claim at all. In my view, no amendment to the pleadings is necessary for all the necessary facts upon which to base such a claim, if it exists as a matter of law, are sufficiently alleged. But if an amendment is thought necessary or desirable to plead the claim specifically leave to make such amendment is granted.

It is well settled that the owner of land expropriated for public purposes is not entitled to compensation either for the value of the land taken or for damage on the ground that his land has been injuriously affected unless he can

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

show a statutory right to such compensation. In Canada such right is conferred by paragraphs (*a*) and (*b*) of Section 19 of the Exchequer Court Act, which read as follows:

19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work.

These paragraphs date back in the same form to paragraphs (*a*) and (*b*) of section 16 of an "Act to amend The Supreme and Exchequer Courts Act", Statutes of Canada, 1887, chap. 16. The words "injuriously affected by the construction of any public work" are also found in a number of sections of the Expropriation Act, for example, sections 23, 26, 27 and 31. It would seem at first sight that the defendant could have no claim for compensation under section 19 (*b*) of the Exchequer Court Act since it could not be shown that any of its property had been injuriously affected by the construction of any public work but at most only that the injurious affecting was the result of use of the premises in which the Crown had taken a leasehold interest. But the weight of judicial opinion expressed in English decisions under the Lands Clauses Consolidation Act, 1945, and their applicability in the construction of the Canadian legislation leads to a wider view of the defendant's rights. The steps by which the Courts have reached the construction to be placed on section 19 (*b*) of the Exchequer Court Act may well be stated.

It has long been held in England that a distinction must be drawn between the rights of two classes of owners to claim compensation for damage to their land on the ground that it has been injuriously affected by the execution of works or the exercise of other statutory powers on other land. The owner has no right to compensation for such damage if it results only from the authorized legal user of land taken from some one other than himself; but the case is otherwise where the injurious affecting of his land is the result of the exercise of the statutory powers on land that was taken from himself and formerly held with his remaining land. In such case the owner is entitled to

compensation for the injurious affecting of his remaining land even when it results from the lawful user of the land taken from him. The first decision making this distinction was *In re The Stockport, Timperley and Altringham Railway Company* (1), now regarded as the basic case on the subject. There the owner of land taken by a railway company for the construction of a railway thereon also owned adjoining land on which his cotton mill was located. The jury called upon to fix the amount of the owner's compensation found a certain sum for the value of the land taken, another for the damage by severance and a third for the damage resulting from the following fact, namely, that the railway company proposed to build its railway so close to the cotton mill that by reason of the proximity of the railway line and the danger of fire from the trains using it the building was less suitable for a cotton mill, was not insurable except at an increased premium and was rendered of less saleable value. It was held that the jury had rightly included such damage in their verdict. Crompton J. made it clear that it was only because part of the owner's land was taken that his right to compensation for the injurious affecting of his remaining land was not limited to the loss or damage resulting from the construction of the public work on the land taken but extended to that resulting from the use of such land. If no part of his land had been taken he would have had no right to compensation against the railway company for an authorized use of lands taken from some one else, even although the value of his property had been depreciated thereby. This is settled law. In *Hammersmith and City Railway Company* v. *Brand* (2) it was held by the House of Lords that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing trains after the railway had been brought into use. And in *City of Glasgow Union Railway Company* v. *Hunter* (3) it was held that compensation could not be claimed, by reason of the noise or smoke of trains, by a person no part of whose property had been injured by anything done on

(1) (1864) 33 L.J.Q.B. 251.
(2) (1869) 4 E. & I. App. 171.
(3) (1870) 2 Sc. App. 78.

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

the land over which the railway ran. These two cases were distinguished from the *Stockport Case* (*supra*) and the latter decision approved without specific mention of it by the House of Lords in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1), where Lord Chelmsford said:

> In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damages caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains.

In that case the plaintiff was the owner of a long leasehold interest in premises extending to the Thames River. The defendant under statutory powers took part of the land nearest the river and constructed the Thames Embankment which separated the remainder of the premises from the river and the embankment became used as a public highway with resulting loss of privacy to the plaintiff and increasing dust and noise from the use of the highway, causing a depreciation in value of the plaintiff's remaining premises. It was held that the arbitrator could properly take these factors into account in making his award of compensation for the land and the injurious affecting of the remainder. The question came before the House of Lords again in *Cowper Essex* v. *Local Board for Acton* (2). There part of the appellant's lands were taken for the purpose of sewage works. Evidence was given that the existence of sewage works, even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellant's other lands for building purposes. It was held that since part of the appellant's land had been taken for the sewage works, compensation might be awarded for damage to be sustained by reason of the injurious affecting of his other lands, not only by the construction of the sewage works but also by their use. At page 161, Lord Halsbury L.C. said:

> Two propositions have now been conclusively established. One is, that land taken under the powers of the Lands Clauses Act, and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not

(1) (1872) 5 E. & I. App. 418 at 458. (2) (1889) 14 A.C. 153.

less conclusively established, and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.

Lord Halsbury explained this seeming contradiction by saying, at page 162:

> The injurious affecting by the use, as distinguished from the construction, is a particular injury suffered by the proprietor from whom such portion of his land is taken different in kind from that which is suffered by the rest of Her Majesty's subjects.

The decision of Crompton J. in the *Stockport Case* (*supra*) was expressly approved.

The same view was taken by this Court in an early case, *The Straits of Canseau Marine Railway Company* v. *The Queen* (1). There part of the plaintiff's land was expropriated for a railway. The tracks were in such close proximity to the plaintiff's works that such works as well as ships in the course of repair upon them would be in danger of fire from locomotives when the railway was put in operation. This would result in the plaintiff's having to pay higher rates of insurance and ships being deterred from using the plaintiff's marine railway. It was held that the Court ought to take these factors into account in fixing the plaintiff's compensation. At page 122, Burbidge J. said:

> Where lands are taken and others held therewith are injuriously affected the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the damage occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user.

Then came the decision of the Judicial Committee of the Privy Council in *Sisters of Charity of Rockingham* v. *The King* (2) which followed the *Cowper Essex Case* (*supra*) and again approved the *Stockport Case* (*supra*). The facts were that prior to the expropriation the appellants owned lands situated both on the east and west sides of a public road and a railway. On the west side they had a school; on the east side directly opposite the school their land consisted of two small promontories of land on the margin of a public harbour on which they had a

(1) (1889) 2 Ex. C.R. 113. (2) (1922) 2 A.C. 315.

1947

THE KING v. ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

bathing house and wharf, both of which were used in connection with the school. The two promontories on the east side were expropriated and on land wholly east of the railway but including the promontories the Crown made a large railway shunting yard. In addition to the claim for compensation for the value of the land taken a claim was made for damages on the ground that the appellant's lands on the west side of the road and railway were injuriously affected by the use of the property east of the railway as a shunting yard. In this Court Cassels J. rejected this claim. As I read his judgment (1), he took the view on the facts that since the shunting yard consisted almost entirely of lands other than those taken from the suppliants, only the small promontories being included therein, the injury to their other lands was caused by the operation of works on lands other than lands taken from them, and, following the English decisions, by which he thought he was bound, dismissed the claim. The Supreme Court of Canada, subject to an additional allowance due to an error of computation adopted his reasoning and conclusion and dismissed the appeal from his judgment (November 2, 1920, unreported). The Judicial Committee reversed the decision of the Canadian Courts. The judgment, delivered by Lord Parmoor, is important for a number of reasons. In the first place, it decided that English decisions under the Lands Clauses Act are applicable in the construction of the sections of the Exchequer Court Act and the Expropriation Act now under review. This opinion had already been expressed in a number of Canadian cases. But for this fact it might well have been held—and I must say that I would have been inclined to such view—that the English decisions to which reference has been made are not applicable to the sections of the Canadian Acts under review on the ground that sections 49, 63 and 68 of The Lands Clauses Consolidation Act on which they were based give wider rights of compensation to the owner of land part of which has been taken under statutory powers than the Canadian legislation does, and that under the Canadian Acts such an owner's claim for damage to his property on the ground that it has been injuriously affected by the construction of a public work

(1) (1919) 18 Ex. C.R. 385.

is limited to damage done by the construction of a public work on the land taken and does not extend to or include damage resulting from the use of such land. Such arguments were made before the Judicial Committee and rejected. It must, therefore, be assumed that the words "construction of a public work" in section 19 of the Exchequer Court Act and in the Expropriation Act ought not to be given the construction which at first sight they seem to warrant but should receive the same interpretation as has been accorded in the English decisions to the corresponding sections of the English Acts ever since the decision in the *Stockport Case* (*supra*), the authority of which is now unquestioned. In differing from the Courts below Lord Parmoor went further than the previous English decisions had gone by extending the principle underlying them to a case such as the one before the Committee and holding that the owner of land was entitled to compensation where the injurious affecting of his land was caused not by the use of land taken from him, but by the use of land taken partly from him and partly from others, even where the lands taken from him are only a small part of the total lands put to adverse use. The right to compensation exists even in such a case, the difficulty involved being only a matter of assessment of the resulting damage. At page 326, he put the position as follows:

> No doubt a difficulty arises in the assessment of amount where the mischief complained of arises, not only on the land which has been taken from the appellants, but also on land over which they had no ownership claim; but this is no reason for refusing to entertain a claim, so far as the damage claimed can be shown to arise from the apprehended legal use of the lands taken from them.

In the English cases in which the owner was held entitled to damages for the injurious affecting of his lands by the use of other lands taken from him there had been the construction of a public work on such other land, but in the present case there was no construction of any public work. The leasehold interest in part of the defendant's land was expropriated for a public purpose for the defence of Canada. But it seems to me that this should make no difference. The English cases granted compensation for loss from the use of the lands taken regardless of whether there was any loss from the

1947

THE KING
v.
ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

construction of a public work thereon or not. The result of applying the English decisions to the corresponding Canadian legislation is to read the words "construction of a public work" as meaning "construction or use of a public work". If that is the meaning, as the decisions indicate, then the fact that there was no construction of a public work on the property taken from the defendant does not itself take this case out of the operation of the Canadian legislation, for it is clear, I think, that the expropriated property can be regarded as a "public work" within the wide meaning thereof in section 2 (*g*) of the Expropriation Act.

The *Sisters of Charity case* (*supra*) is also of importance in laying down that the measure of damages in a claim for damage to property injuriously affected is its depreciation in value as the result of its being so injuriously affected. Nor is it necessary to show that such depreciation is the result of actual adverse use of the other land taken from the owner; it is sufficient to show that it is due only to an anticipated use.

Under the circumstances, I think it may be stated that in Canada if land is expropriated under the Expropriation Act and its actual or anticipated use is such that other lands held by the same owner are injuriously affected thereby so that they are depreciated in value the owner is entitled to compensation not only for the value of the expropriated land but also for the depreciation in value of his remaining lands to the extent that such depreciation is the result of the actual or anticipated use of the expropriated land.

That being so, the defendant has a right to compensation by reason of the dangerous storage of explosives in the raw sugar shed. It was only in respect of a part of the defendant's plant at Woodside that a leasehold interest was expropriated but the storage of the explosives rendered the whole plant less insurable than it had previously been. To that extent the defendant's remaining property, being the whole property at Woodside subject only to the expropriated leasehold interest in part of it was injuriously affected by the use made of such part. It is clear, I think, that the reduced insurability of the property would result in some depreciation in its value.

I find great difficulty in assessing the amount of the defendant's entitlement under this head. Counsel for the plaintiff contended that any prudent and reasonable owner of property, such as that of the defendant, would take out War Risk Insurance in any event, that it was not shown that the defendant would not have done so, and that the defendant was not entitled to any part of the premium. For the defendant, on the other hand, it was contended that but for the storage of the explosives, it would not have been necessary to take out War Risk Insurance at all and that the defendant should be repaid its whole premium for the insurance both of its plant at Woodside and also of the plant of its subsidiary at Saint John, since it could not get the one without paying for both. I am unable to see how this claim can really be justified. The amount of the premium is determined by the extent of the properties of the defendant and its subsidiaries at Woodside and elsewhere but the amount of the defendant's claim for damages is limited to the extent of the depreciation in value of its premises at Woodside, and it cannot be said that such depreciation in value is the same as or is to be measured by the amount of the premium paid. It might be very much less. If the whole premium were repaid to the defendant that would put it and its subsidiary in a better position than they would have been in if there had been no storage of explosives in the raw sugar shed. Moreover, that portion of the premium attributable to the insurance of property other than the defendant's property at Woodside is too remote to be regarded as damage resulting from the storage of the explosives. In my view, it is not possible to fix the amount of the defendant's entitlement precisely, but I think that if it were awarded the portion of the insurance premium atttributable to its property at Woodside this would be the most that it could reasonably claim, and I fix the amount of the defendant's entitlement accordingly at $8,477.06, although not without some doubt as to whether I should allow even this amount. Since the compensation to which the defendant is entitled is thus in excess of the plaintiff's tender, the said amount will carry interest at the rate of 5 per centum per annum from December 24, 1942, to the date hereof.

1947

THE KING
v.
ACADIA SUGAR REFINING COMPANY LIMITED

Thorson P.

There will, therefore, be judgment that the leasehold interest in the premises described in paragraph 2 was vested in His Majesty for the period specified in the Information, that the amount of compensation to which the defendant is entitled is the sum of $8,477.06 together with interest thereon as stated, and that the defendant is entitled to its costs.

Judgment accordingly.